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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, ____

## No. 1377

ROBERT M. ROSE, M.D., DORIS D. ROSE,
Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

Petition For Writ Of Certiorari To The United States Court Of Appeals, Fifth Circuit.

ROBERT M. ROSE, M. D.
1520 Louisiana Avenue
New Orleans, Louisiana 70115
PRO SE

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, ——

No. _____

ROBERT M. ROSE, M. D., DORIS D. ROSE,
Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

TO THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit originally entered on October 14, 1970, whereby Petitioner's lawsuit was dismissed.

Timely re-hearing En Banc denied on November 16, 1970.

## OPINIONS BELOW

The United States Court of Appeals, Fifth Circuit,

summarily refused to consider the points raised by Petitioner's appeal, and rendered decision, without an opinion, as per copy attached.

Petition for re-hearing En Banc was also denied, as per copy attached.

## JURISDICTION

Petitioner originally sued in the United States Tax Court for a determination of the medical nature of the costs of treatment of his daughter's illness, and for the allowance of those expenses as medically deductible in computing his income tax for 1964, as authorized by Statute Sec. 213(e) (1) (A) (B).

The Tax Court's decision, based on Income Tax Regulation Sec. 1.213-1 was against Petitioner, and was affirmed on appeal, without opinion, by the United States Court of Appeals, Fifth Circuit, dated and entered October 14, 1970. Petition for re-hearing En Banc was denied and was dated and entered November 16. 1970. Petitioner invokes the provisions of 28 U.S.C. Sec. 1254 as the jurisdictional ground for this application.

## STATUTES, REGULATIONS AND CONGRESSIONAL INTENT INVOLVED

Sec. 23(x), 1939 Internal Revenue Code

> "The term "medical care" as used in this subsection, shall include amounts paid for the diagnosis, cure, mitigation, treatment, or pre-

vention of disease, or for the purpose of affecting any structure or function of the body."

Sec. 213(e) (1) (A) (B), 1954 Internal Revenue Code

"(e) Definitions — for purposes of this section —

(1) The term "medical care" means amounts paid —

(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A)"

Rept. Com. on Fin. U.S. Senate to accompany H.R. 8300 (1954), Pages 219, 220.

"Subsection (e) defines medical care to mean amounts paid for the diagnosis, cure, mitigation, treatment, or prevention, of diseases or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance) or for transportation primarily for and essential to medical care. The deduction permitted for "transportation primarily for and essential to medical care" clarifies existing law in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida

in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible but not his living expenses while there. However, if a doctor prescribed an appendectomy and the taxpayer chose to go to Florida for this operation not even his transportation costs would be deductible. The subsection is not intended otherwise to change the existing definitions of medical care, to deny the cost of ordinary ambulance transportation nor to deny the cost of food or lodging provided as part of a hospital bill."

Sec. 1.213-1 Income Tax Regulations

(iv) "Expenses paid for transportation primarily for and essential to the rendition of the medical care are expenses paid for medical care. However, an amount allowable as a deduction for "transportation primarily for and essential to medical care" shall not include the cost of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a taxpayer go to a warm climate in order to alleviate a specific chronic ailment, the cost of meals and lodging while there would not be deductible. On the other hand, if the travel is undertaken

merely for the general improvement of a taxpayer's health, neither cost of transportation nor the cost of meals and lodging would be deductible. If a doctor prescribes an operation or other medical care, and the taxpayer chooses, for purely personal considerations to travel to another locality (such as a resort area) for the operation or the other medical care, neither the cost of transportation nor the cost of meals and lodging (except where paid as part of a hospital bill) is deductible.

(v) The cost of in-patient hospital care (including the cost of meals and lodging therein) is an expenditure for medical care. The extent to which expenses for care in an institution other than a hospital shall constitute medical care is primarily a question of fact which depends on the condition of the individual and the nature of the services he receives (rather than the nature of the institution * * *)"

## QUESTIONS PRESENTED

1. Whether the administrative Regulations of the Commissioner of Internal Revenue (Sec. 1.213-1) which violate statutory construction by altering the expressed intent of Congress (Rept. Com. on Fin. U.S. Senate, to accompany H.R. 8300 (1954) ) are to displace and supersede Statute (Sec. 213) as the basis for Court decision.

2. The Commissioner has claimed that decision in the Bilder case (Comm. v. Bilder, 369 U.S. 499 (1962), revising 289 F 2d 291 (C.S. 3, 1961) and 32 TC 1197 (1959) establishes legal basis for claiming in his Income Tax Regulations Sec. 1.213-1 that any costs of food and lodging *essential* to the treatment of illness is not ever deductible medical expense, unless incurred at a hospital or other medical care institution. Justice Harlan in the Bilder decision only specified costs of food and lodging that were *incidental* to medical treatment.

3. In this case, expenses of food and lodging were directly occasioned by the only remaining treatment of illness after all other treatments had failed. The treatment could not have been effected without these concomitant expenses, which expenses were in addition to and not connected with the taxpayer's continued maintenance of his household. Are these not actual expenses of medical treatment allowed by (Sec. 213) and not denied by Congress' intent? (Rept. Com. on Fin. U.S. Senate, to accompany H.R. 8300 (1954) ).

4. Can the undisputed medical testimony of competent medical witnesses of outstanding qualifications be disregarded in a Court determination of medical facts?

5. Can the Tax Court specify that my daughter was treated during her illness by Dr. Jack Strange, and that the facts of her illness were stipulated, when Dr. Strange did not treat her and the facts of her illness were not stipulated?

6. Did the Tax Court err in taking no cognizance of the doctors who did treat my daughter during her illness and of their testimony in Court?

## STATEMENT OF THE CASE

During the first ten years of her life, my daughter had only suffered minor illnesses. Then, in mid 1964, she began having recurrent attacks of choking, inability to breathe, unconsciousness, convulsions and coma.

She was at death's door with each attack, and she had these attacks over and over. Successive, repeated hospitalization failed to reveal the cause of her illness and all treatment failed to arrest, ameliorate or halt the progression of her condition. Finally, after all other treatments had failed, the only remaining treatment of climatological change was tried, by taking her to Destin, Florida, my wife being in constant nursing attendance. This change promptly arrested the progression of her illness. Treatment of altered environment in New Orleans was next tried, she was maintained in a tenth floor, fully air-conditioned new apartment on the grounds of the Southern Baptist Hospital. Her condition there again slowly progressed, in spite of all treatment, and she developed severe complications of cortisone treatment and hemorrhaging from desensitization shots. In seriously deteriorated physical condition, with recurrence of the convulsive attacks imminent, she was taken precipitously to Arizona by my wife, Doris. We had not moved her quickly enough, the convulsive attacks re-occurred. She also began coughing up copious amounts of pus, and, after car-

diac catheterization, her illness was diagnosed as severe, disseminated staphylococcal bronchial infection. On advice of the Arizona physicians, she was later transferred to Florida, again by my wife, who was her constant nurse throughout her illness. In Florida, she improved slowly. Each time that we have returned her to New Orleans, her condition has gradually deteriorated and we have had to return her to Florida. She had a convulsion here in New Orleans in August of last year, and she still cannot live in this area. Dr. Seabury has stated that the residual scar tissue in her lungs, the aftermath of her illness, will seriously affect her for the rest of her life and that it is doubtful that she will live beyond the age of 36.

Throughout her illness, and since, the maintenance of my household in New Orleans continued uninterrupted with relatively unchanged expenses.

My daughter was not treated by Dr. Jack Strange during her illness, and the facts of her illness were not stipulated in the Tax Court, as that Court's Findings of Fact specifies. My daughter was treated by Dr. Carl Gulotta and Dr. John Seabury and myself. Dr. Carl Gulotta is certified by the Board of Internal Medicine and is a professor of Medicine at the Louisiana State University Medical School.

Dr. John Seabury is certified by the Board of Internal Medicine. He is a professor of Medicine at the Louisiana State University Medical School and head of the Department of Internal Medicine. He is head of the Respiratory Disease Research Center at the New

Orleans Charity Hospital and is one of the most outstanding and eminent physicians in the field of respiratory diseases in the South.

These physicians, and myself as a physician, testified in Tax Court on April 16, 1968 as to the medical facts of Suzanne's illness and its treatment. All testimony was unassailable, uncontradicted and uncontradictory.

The Tax Court Findings of Fact, filed June 24, 1969 makes no note of the existence of these doctors, their role in the treatment of my daughter's illness, or of their testimony in Court. The most important, relevant facts of the history of her illness have been omitted or ignored by the Tax Court. Proper determination can only result from proper fact, and proper fact has not been presented in the Tax Court's Findings of Fact.

The Tax Court's decision denying expenses of food and lodging in this case as medical expenses was based on Income Tax Regulation, Sec. 1.213-1 (e) (1) and not on Statute Sec. 213. Examination of the Regulation shows that it unequivocally alters the expressed intent of Congress (Rept. Com. on Fin. U.S. Senate, to accompany H.R. 8300 (1954) ).

The Tax Court's decision equates my child's illness and its treatment as identical to that of Bilder's illness and treatment, which it was not and, therefore, the Bilder decision does not apply to her case.

The Tax Court disallowed the expenses of food and lodging occasioned by the climatological and environmental treatment of her illness, the only remaining treatment after all other treatment had failed, and also denied the medical nature of my role as a physician in monitoring her illness at Destin, and disallowed the expenses occasioned thereby.

That decision was appealed to the United States Court of Appeals, Fifth Circuit, as provided by F.R.A.P. Rule 13.

## REASONS FOR THE WRIT

The reasons for granting this certiorari are impelling and timely, Bureaucratic control is being imposed on the citizens of this Country and the important question as to whether the taxpayers of this land are to be enslaved by non-statutory Regulation or to be governed by Federal Law is raised by this case.

Decision in this case was on the basis of Income Tax Regulation (Sec. 1.213-1) and not on the basis of Statute (Sec. 213). Examination reveals that the Commissioner of Internal Revenue, in formulating the Income Tax Regulation (Sec. 1.213-1) has violated all laws and decisions governing statutory interpretation, from the time of the Heirs of Boisdore case to the present. (United States v. the Heirs of Boisdore, 1850, 8 How. 113, 122, 12 L.Ed. 1009. United States v. Shreveport Grain and El. Co., 1932, 287 U.S. 77, 83, 53 S.Ct. 42, 44, 77 L.Ed. 175. St. Louis I.M. & S. Ry. v. Craft, 1915, 237 U.S. 648, 661, 35 S.Ct. 704, 707, 59 L.Ed. 1160.

Maestro Plastics Corp. v. N.L.R.B., 1956, 350 U.S. 270, 286, 76 S.Ct. 349, 360, 100 L.Ed. 309. F.T.C. v. A.P.W. Paper Co., 1946, 328 U.S. 193, 202, 66 S.Ct. 932, 90 L.Ed. 1165. Helvering v. Bliss, 1934, 293 U.S. 144, 151, 55 S.Ct. 17, 20, 79, L.Ed. 246. Hollander v. United States, 2 Cir., 1957, 248, F2d 247, 251., et al.)

The Commissioner claims that his Income Tax Regulations (Sec. 1.213-1) derive from the expressed intent of Congress, (Rept. Com. on Fin. U.S. Senate, to accompany H.R. 8300 (1954) ) which was upheld as "unassailable" by this Court's Bilder decision. What is actually "unassailable" is the Commissioner's misrepresentation of Justice Harlan's opinion, and the Commissioner's alterations of the expressed intent of Congress, clearly violative of statutory construction.

**Point A**

Justice Harlan remarked, in the Bilder decision, that "it was abundantly clear that Congress did not wish to allow expenses of food and lodging which are *incidental* to medical treatment". The Commissioner makes use of this remark as legal basis to deny costs of food and lodging which are *essential* to medical treatment.

It is axiomatic that words should be taken at their commonly accepted meaning and any dictionary affirms that 'incidental' means "happening as a chance feature of; subordinate, as an 'incidental' expense".

The lower Courts accept, without question, the statements of the Commissioner and of his attorneys. I find no instance where they have taken any note of the disparity between the true, factual meaning of Justice Harlan's observation and of the Commissioner's misrepresentation thereof, which is being used to deny the taxpayer that which is clearly his by Statute and by Congressional Intent, the right to deduction of expenses of food and lodging which are *essential* to medical treatment. The perpetration of this wrong against the Public can only be halted by this Court, for its implementation is being effected by misrepresentation of an opinion of this Court, which passes the lower Court without question. Timely intervention in this misapplication of an opinion that this Court has expressed is very much needed in the Public interest.

**Point B**

This Court's correction of this misrepresentation is a matter of urgent Public need for the Regulations as now expressed by the Commissioner, are discriminatory and are being used by the very rich to write off their ordinary living expenses as medical expense in a manner not intended by Congress, and denied by present Regulation to those less rich. The very rich, for any illness at all, simply elect to live in the hospital. All of their expenses of such living are unquestionably accepted as medical expenses by the Internal Revenue Service. I, personally, have a patient, weak and unable to care for herself, to be sure. Though medically dischargeable, she has elected to live in the hospital for the past three years. The tax write off of all

of the hospital charges makes it less expensive to remain there than to maintain herself at home. Her sister, some years ago, also treated by me, remained in the hospital for six months after surgical fixation of a broken hip, until she could walk again. Only a rich very few can afford the luxury of such tax write off, as the Regulations now grant. There are many, sick, disabled, convalescent taxpayers who must maintain themselves as best they can. They receive no such bureaucratic concession for the costs of food and lodging, either *incidental* or *essential* to their medical treatment. This is gross public inequity, never intended by Congress, and only this Court can correct it.

**Point C**

The Commissioner has altered the three conditions that Congress specified should prevail, for transportation costs to be allowed as medical expense, but wherein expenses of food and lodging were not to be allowed:

1. A doctor prescribes

2. that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer

3. *AND* the travel is prescribed for reasons *other* than the general improvement of a patient's health.

The Commissioner's Regulations (Sec. 1.213-1) have changed this to:

> "* * * For example, if a doctor prescribes that a taxpayer go to a warm climate in order to alleviate a specific chronic ailment, the cost of meals and lodging there would not be deductible."

The Commissioner's Regulations ignore the third qualification, undeniably and unquestionably linked to the first two by the conjunctive *and*. The Commissioner, in his Regulations, then takes this third qualifying phrase, and sets it up as its own complete entity, the conjunctive "and" being changed to the separating phrase "on the other hand":

> "On the other hand, if the travel is undertaken merely for the general improvement of a taxpayer's health, neither cost of transportation nor the cost of meals and lodging would be deductible."

This third qualifying phrase was never intended or expressed by Congress to be construed as a separate entity as has been done by the Commissioner.

**Point D**

The Commissioner has also altered Congress' statement that:

> "... The subsection is not intended * * * to deny the cost of food or lodging provided as part of a hospital bill."

In the Commissioner's Regulations (Sec. 1.213-1) this has been changed to:

> "(v) The cost of in-patient hospital care (including the cost of meals and lodging therein) is an expenditure for medical care * * *".

Not at all the same meaning expressed by Congress. Congress stated that it did not want to have anything that it had said above in its statement of intent to be used to deny the taxpayer the costs of food and lodging as a medical expense when such costs were part of a hospital bill. The Commissioner has rephrased Congress' expression and uses it to deny *all* costs of food and lodging, regardless of the circumstances of their occurrence, as medical expenses, except when part of a hospital bill, from which, incidentally and parenthetically, they are an inseparable part, for infusions, blood transfusions and any number of medications also serve as foods. Ferreting out and denying them would be some problem in accountancy.

**Point E**

Two wrongs do not make a right and never have. To date, no Court has made note of or passed opinion on the Commissioner's obvious and undeniable alterations of the intent of Congress in his Income Tax Regu-

lations. On the basis of continued perpetration of his wrong in this regard, the Commissioner's attorneys now maintain still further perpetration as their "right" on the basis of "custom and usage". So certain are they that Courts will not carefully examine the basis for their claims and statements, that in this case, they headed their Argument, Page 9 of their Brief to the Court of Appeals, Fifth Circuit, as follows:

**ARGUMENT**

I

"SECTION 213 OF THE INTERNAL REVENUE CODE OF 1954 DOES NOT PERMIT THE DEDUCTION OF THE COST OF MEALS, LODGING OR OTHER LIVING EXPENSES, IF NOT INCURRED AT A HOSPITAL OR OTHER MEDICAL CARE INSTITUTION."

Section 213 of the 1954 Internal Revenue Code clearly makes no such remark or statement, and Congress' expressed intent also makes no such remark or statement.

All lower Courts, at this time, are accepting the Commissioner's misstatements at face value. Ambiguity has been created where ambiguity does not exist. "Legislative history is to 'solve', but not to 'create' an ambiguity." (United States v. Shreveport Grain and El. Co., 1932, 287 U.S. 77, 83, 53 S.Ct. 4244, 77 L.Ed. 175.) Statute has been voided, "Legislative history of

a statute may not be taken as giving to it 'a meaning not fairly within its words'" (St. Louis I.M.&S. Ry. v. Craft., 1915, 237 U.S. 648, 661, 35 S.Ct. 704, 707, 59 L.Ed. 1160.) and Statute has been repealed, "repeals of a statute by implication are not favored" (F.T.C. v. A.P.W. Paper Co., 1946, 328 U.S. 193, 202, 66 S.Ct. 932, 90 L.Ed. 1165) "Remedial statutes should be construed in favor of those intended to be benefitted" (Helvering v. Bliss, 1934, 293 U.S. 144, 151, 55 S.Ct. 17, 20, 79, L.Ed. 246.)

Congress' expressed intent (Rept. Com. on Fin. U.S. Senate, to accompany H.R. 8300 (1954) ), has been subverted, Congress' expression of Public Policy has been by-passed and the fact that Congress has progressively extended and liberalized the allowable amounts deductible as medical expenses has been consistently ignored. Only this Court can correct this present bureaucratic oppression of the taxpayer, that this shall be a Government of Law, and not of men.

**Point F**

Yet another factor in the Public interest deserves your consideration. The cost of hospital treatment has skyrocketed and is still going up. Hospital beds are in very short supply and many who are ill, unable to be treated locally and unable to be admitted to medical centers away from their home, are treated at medical centers as outpatients, and maintain themselves in nearby hotels, motels, or other accommodations. Their expenses of food and lodging, in these instances, are clearly medical in nature, and, as a rule, are in

addition to and above the continued maintenance of their household, their permanent residence. Neither the statute 213 (e) (1) (A) (B) or Congress' expression of intent (Rept. Com. on Fin. U.S. Senate, to accompany H.R. 8300 (1954) ) denies the medical nature of the expenses of food and lodging in such instances, and the expenses are certainly not *incidental* to medical treatment and, therefore, are not deniable under the Bilder decision. Yet this Court's Bilder decision regarding *incidental* expenses is being used as the legal basis for denying the medical nature of *all* costs of food and lodging, in the treatment of any and all illness, except when a patient is confined in a hospital, any hospital, anywhere, anytime, and for whatever reason.

## CONCLUSION

In this case, maintaining my daughter in Florida, at the Bristow Towers and in Arizona constituted the only remaining treatments of her illness, after all other treatments and hospitalizations had failed. The expenses of food and lodging occasioned thereby would not have been incurred had the illness not occurred. The treatments of climatological and environmental change could not have been effected without the concomitant expenses of food and lodging. These treatments, and these alone saved her life. My household and its maintenance did not move with this child as her various medical moves were instituted. This case is not similar to the Bilder case medically. Bilder moved at will, and his family moved with him. Bilder could always return to his home in New York, after the inclement weather had passed, and he did. My child's con-

dition has deteriorated each time that we have returned her to New Orleans, and she had a convulsion here in August of last year, 1970.

This case is also not similar to the Bilder case legally. Bilder's case fits to a "T" the example Congress gave as to when it intended that transportation costs should be allowed as medical expense, but not the expenses of food and lodging, the three examples noted previously (not the Commissioner's two). This case does not fit Congress' example and, therefore, the Bilder decision should not be applied to this case.

This Court's legal affirmation of the facts of this case, that the expenses of food and lodging here were clearly and purely medical in nature, and that as "extraordinary medical expenses" these are clearly allowed deductible by Law, Sec. 213(e) (1) (A) (B), and are not denied by the Bilder decision or by Congressional Intent, is very clearly needed in the Public interest, for the Commissioner of Internal Revenue is even now using his Tax Court's decision in this yet unsettled case as legal basis for denying similar expenses in similar cases.

Respectfully submitted,

ROBERT M. ROSE, M. D.
1520 Louisiana Avenue
New Orleans, Louisiana 70115
PRO SE

FEB 12 1971

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that three true copies of the foregoing petition for certiorari have been furnished by U. S. mail, postage prepaid, to:

JOHNNIE M. WALTERS
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Single copy has been furnished to:

HON. EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals for
the Fifth Circuit
400 Royal Street, Room 408
New Orleans, Louisiana 70130

Service of the foregoing copies effected this ____ day of February, 1971.

Robert M. Rose, M.D.
Pro Se

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 29188

---

ROBERT M. ROSE, and DORIS D. ROSE,
Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

---

*Appeal from a Decision of the Tax Court of the United States (Louisiana Case)*

---

(October 14, 1970)

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Before TUTTLE, BELL and GOLDBERG, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See NLRB v. Amalgamated Clothing Workers of America, ——— F.2d ——— [No. 28680, 5th Cir., August 12, 1970].

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 29188

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ROBERT M. ROSE, and DORIS D. ROSE,
Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

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*Appeal from a Decision of the Tax Court of the United States (Louisiana Case)*

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*ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC*

(Opinion Oct. 14, 1970, 5 Cir., 1970, _____F.2d_____).

---

(November 16, 1970)

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Before TUTTLE, BELL, and GOLDBERG, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of

the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1377

ROBERT M. ROSE AND DORIS D. ROSE, PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The judgment of the court of appeals was entered on October 14, 1970, and the petition for rehearing and petition for rehearing en banc were denied on November 16, 1970. The 90-day period for filing a petition for a writ of certiorari prescribed by 28 U.S.C. 2101(c) expired on February 14, 1971, and no extension of time was granted. The petition was filed on February 22, 1971. Since the 90-day time limitation is jurisdictional, the petition is untimely and should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

MARCH 1971.



418-759—71

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# Supreme Court of the United States

OCTOBER TERM, 1970

## No. 1377

ROBERT M. ROSE, M.D., DORIS D. ROSE,
Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

**Reply By Petitioner to Memorandum for the Respondent in Opposition**

ROBERT M. ROSE, M. D.
1520 Louisiana Avenue
New Orleans, Louisiana 70115
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

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No. 1377

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ROBERT M. ROSE, M. D., DORIS D. ROSE,
Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

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# REPLY BY PETITIONER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

---

TO THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The following is in reply to the Memorandum for the Respondent in Opposition filed by the Solicitor General.

This matter should be controlled by the Rules of the Supreme Court.

The expiration date of February 14th, 1971 was on a Sunday. By Rule 34 of the Supreme Court, this extended the filing date to February 15th, 1971. February 15th, 1971 was a legal holiday, George Washington's Birthday, so, again by Rule 34 this extended the filing date

to *February 16th, 1971,* not the February 14th, 1971 date specified by the Solicitor General.

I personally mailed the Petition at the Main Post Office here in New Orleans at about 1:30 P.M. on February 12th, 1971. I personally instructed the postal clerk that it was to be sent first class mail, and paid therefor.

On February 12th, 1971, I entrusted the delivery of my Petition, within the 90 day period, to the United States Government Postal Service, ample time for it to have been received in Washington, D. C. on *February 16th, 1971,* the date it was due by Supreme Court Rule 34. This matter before the Court is of such Public importance that had I even suspected that the mail service of this Petition would be so deleterious, I would have flown to Washington with it on Friday night, February 12th and filed it personally with the Court on Saturday morning, February 13th.

The Petition was docketed in the Supreme Court on February 22nd, 1971. I do not know whether the date of receipt by the Court is the same as the date of docketing. The unreasonable and unanticipated lapse of time during which the Petition was being transmitted through the mail was certainly beyond my control and any error, if error does exist, is harmless.

Robert M. Rose, M.D. Pro Se
1520 Louisiana Avenue
New Orleans, Louisiana 70115

MAR 23 1971

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that three true copies of the foregoing reply have been furnished by U. S. mail, postage prepaid, to:

ERWIN N. GRISWOLD
Solicitor General
Office of the Solicitor General
Department of Justice
Washington, D. C. 20530

JOHNNIE M. WALTERS
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Single copy has been furnished to:

HON. EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals for the
Fifth Circuit
400 Royal Street, Room 408
New Orleans, Louisiana 70130

Service of the foregoing copies effected this 23 day of March, 1971.

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Robert M. Rose, M.D. Pro Se
1520 Louisiana Avenue
New Orleans, Louisiana 70115